



A GUIDING LIGHT ON SECTION 57 OF THE TRANSFER OF PROPERTY ACT, 1882 BY THE KERALA HIGH COURT

The Kerala High Court passed a significant judgment in the matter of *M. P. Varghese v. Annamma Yacob & Anr.* on 5th August 2020 elucidating, clarifying and explaining the procedural mechanism under Section 57 of TOPA to lift the encumbrances from an immovable property. Section 57 of TOPA enables any party to the sale of an immovable property, burdened with an encumbrance, to apply, to a Court for a declaration that the said property is free of encumbrances on the deposit of sums to be adjudged by it and for the issuance of and order of conveyance or vesting order, proper for giving effect to the sale.

The Judgment clarified certain key aspects of S. 57:

- i. The Hon'ble Court noted that the S. 57 was adopted from S. 5 of the English Conveyancing and Law of Property Act, 1881 ("English Act"), with minor modifications and placed reliance on the ruling of an English Court in *Freme's Contract (1895) 2 Ch. 256* and *Wilberforce v. Wilberforce (1915) 1 Ch 94*.

The Hon'ble Court clarified that S. 57 was enacted to assist any party to the sale of an immovable property, which is burdened with an encumbrance to fructify the sale for its fair value, enabling the purchaser of the immovable property to receive, in deposit either the capitalized value of the periodical charge or the capital sum charged on the property as the case may be.

- ii. The Hon'ble Court clarified that S. 57 provides for sale of immovable property both 'by a court' or 'out of court' as also 'in execution of a decree'.
- iii. The Hon'ble Court observed that S. 57 permits the Court to declare a property free of encumbrance even against the will of the encumbrancer. This position was analyzed in contrast with Order XXXIV Rule 12 (Sale of property subject to prior mortgage) of CPC, which provides that where any property subject to a mortgage is ordered to be sold the Court may "with consent of the prior mortgagee" direct that it be sold free from the mortgage, giving to the mortgagee the same interest in the proceeds of the sale as he had when the property is sold. Thus, it was held that S. 57 is wider in its amplitude than Section 83 or Order XXXIV Rule 12 of CPC, since it permits the court to declare

a property free of encumbrances even against the will of the encumbrancer and even in the case of sales not directed by Order XXXIV of the CPC.

However, the Hon'ble Court stated that the Madras High Court in ***Mallikarujna Sasti v. Narasimha Rao (1901) ILR 24 Mad 412***, held that *"the section (57) cannot be applied when it comes to a charge or encumbrance already adjudicated by a court and which has become a part of a decree or even in a case of adjustment of a decree out of court"*

Factual Matrix:

- a) The Appeal is against the impugned order of the Additional District Court, Ernakulam. Disallowing the plea of the Appellant herein for discharge of encumbrance on his property under S. 57 of TOPA for effecting sale.
- b) The Appellant and the Respondents are siblings. By a deed of Partition left by their father the Appellant and the Second Respondent-brother were allotted land. However, the Partition Deed contained a covenant that both the Appellant and the Second Respondent- brother must pay an amount of Rs. 500/- to the First Respondent-Sister, within a year, failing which she has been allowed to recover it, for which purpose, the said amount stands charged on the respective properties.
- c) The dispute arose when the Appellant wished to sell the property allotted to him to get his adopted daughter married but due to the charge was unable to execute the Sale Deed as the First Respondent refused to accept the amount due to her due to personal disputes between the Appellant and the First Respondent.
- d) The District Court rejected the application filed under section 57 of TOPA holding that the provisions cannot be applied *"where a direction for payment in a partition deed is sought to be enforce"*.
- e) The Hon'ble High Court set aside the order of the Ld. Addl. District Court as below:
 - i. The Hon'ble Court stated that what is sought for by the Petitioner is not to enforce a direction for payment in the Partition Deed, but to declare that the property is free of encumbrance subsisting on account of the amount under the Partition Deed remaining unpaid.
 - ii. It was observed by the Hon'ble Court that the Appellant could not be put to a disadvantage merely based on the First Respondent's personal disputes. The First Respondent has only stated that *"her conscience is not willing to accept the money"*

- iii. Further, it was contended by the Respondent that the Appellant's daughter was already married and hence the reason given by the Appellant for making the sale was untrue. However, while discarding this contention of the First Respondent the Hon'ble Court clarified that the S. 57 of TOPA does not mandate the court to be satisfied of the reasons for the proposed sale and hence the contention of the Respondent regarding the particulars for the reason to sell the allotted property are irrelevant. the Appellant only needs to plead and show the factum of the proposed sale and nothing more.

In summation, the Hon'ble High Court set aside the impugned order stating that merely because the First Respondent refused to accept the amount on account of personal disputes does not mean the Appellant must be disadvantaged. Further, The Appellant merely had to show an intention to sell the immovable property and was not mandatorily required to provide a reason for sale.

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